

Chapter 6 PENALTIES AND DEBT COLLECTION

I. General Penalty Policy.

The penalty structure in Section 396-10 of the HIOSH Law is designed primarily to provide an incentive for preventing or correcting violations voluntarily, not only to the cited employer, but to other employers. While penalties are not designed as punishment for violations, the Legislature has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations.

Proposed penalties, therefore, serve the public policy purpose intended under the Law; and criteria approved for such penalties by the Administrator are based on effectuating this purpose.

The penalty structure described in this chapter is part of HIOSH's general enforcement policy and shall normally be applied as set forth below. If, in a specific case, the Branch Manager or Administrator determines that it is warranted to depart from the general policy in order to achieve the appropriate deterrent effect, the extent of the departure and the reasons for doing so should be fully explained in the case file.

II. Civil Penalties.

A. Statutory Authority for Civil Penalties.

Section 396-10 provides the Director with the statutory authority to assess civil penalties for violations of the Law. Civil penalties advance the purposes of the Law by encouraging compliance and deterring violations.

1. Section 10(f) of the Law provides that any employer who willfully or repeatedly violates the Law, rule, citation, or order shall be assessed a civil penalty of not more than \$77,000 for each violation, but not less than \$5,500 for each violation [*interpreted to apply only to willful violations*].
2. Section 10(b) provides that any employer who has received an order or citation for a serious violation shall be assessed a civil penalty of up to \$7,700 for each violation.
3. Section 10(c) provides that, when the violation is specifically determined not to be of a serious nature, a proposed civil penalty of up to \$7,700 may be assessed for each violation.
4. Section 10(d) provides that each day a violation continues shall constitute a separate violation except during the abatement period.
5. Section 10(e) provides that, when a violation of a posting requirement is cited, a civil penalty of up to \$7,700 shall be assessed for each violation.

B. Appropriation Act Restrictions.

In providing funding for OSHA and the State Plans such as Hawaii, Congress has placed restrictions on enforcement activities regarding two categories of employers: small farming operations and small employers in low-hazard

industries. The Appropriations Act contains limits for OSH Act activities on a year-by-year basis.

While the Appropriations Act forbids the use of OSHA funds under the 23(g) grant for such activities, HIOSH Law contains no such restrictions. Enforcement activity must continue, however, time spent must be charged to 100% State.

NOTE: See CPL 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act, issued May 28, 1998 and adopted by Hawaii on July 10, 1998, for additional information. Appendix A of that directive contains the list of low-hazard industries, which is updated annually.

C. Minimum Penalties.

The following policies apply:

1. The proposed penalty for any willful violation shall not be less than \$5,500. The \$5,500 penalty is a statutory minimum and not subject to administrative discretion. This minimum penalty applies to all willful violations, whether serious or other-than-serious.
2. When the proposed penalty for a serious violation (citation item) would amount to less than \$100, a \$100 penalty shall be proposed for that violation.
3. When the proposed penalty for an other-than-serious violation (citation item), or a regulatory violation other than a posting violation, would amount to less than \$100, no penalty shall be proposed for that violation.
4. When the proposed penalty for a posting violation (citation item) would amount to less than \$100, a \$100 penalty shall be proposed for that violation.

D. Maximum Penalties.

The civil penalty amounts included in Section 396-10 are generally maximum amounts before any permissible reductions are taken.

Table 6-1 below summarizes the maximum amounts for proposed civil penalties:

Table 6-1: Maximum Amounts for Civil Penalties

| Type of Violation | Penalty Maximum |
|----------------------|---|
| Serious | \$7,700 per violation |
| Other-Than-Serious | \$7,700 per violation |
| Willful or Repeated | \$77,000 per violation |
| Posting Requirements | \$7,700 per violation |
| Failure to Abate | \$7,700 per day unabated beyond the abatement date [generally limited to 30 days maximum] |

III. Penalty Factors.

Section 10(j) of the Law provides that penalties shall be assessed giving due consideration to four factors:

- ▶ The **gravity** of the violation;
- ▶ **Size** of the employer's business;
- ▶ The **good faith** of the employer; and
- ▶ The employer's **history** of previous violations.

A. Gravity of Violation.

The gravity of the violation is the primary consideration in determining penalty amounts. It shall be the basis for calculating the basic penalty for serious and other-than-serious violations. To determine the gravity of a violation, the following two assessments shall be made:

- The **severity** of the injury or illness which could result from the alleged violation.
- The **probability** of an accident or incident that could result in an injury or illness as a result of the alleged violation.

1. **Severity Assessment.** The classification of an alleged violation as serious or other-than-serious is based on the severity of the potential injury or illness and is the first step. The following categories shall be considered in assessing the severity of potential injuries or illnesses:

- a. **For Serious:**

- **High Severity:** Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.
- **Medium Severity:** Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability.
- **Low Severity:** Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.

- b. **For Other-Than-Serious:**

- **Minimal Severity:** Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the most serious injury or illness that could reasonably be expected to result from an employee's exposure would not be low, medium or high severity and would not cause death.

2. **Probability Assessment.** The probability that an injury or illness could result from a hazard has no role in determining the classification of a violation, but does affect the amount of the proposed penalty.

a. **Probability shall be categorized either as greater or as lesser.**

- **Greater Probability:** Results when the likelihood that the incident or accident which could cause the injury or illness is judged to be relatively high.
- **Lesser Probability:** Results when the likelihood that the incident or accident which could cause the injury or illness is judged to be relatively low.

b. **How to Determine Probability.**

The following factors shall be considered, as appropriate, when violations are likely to result in injury or illness:

- Number of employees exposed;
- Frequency of exposure or duration of employee over-exposure to contaminants;
- Employee proximity to the hazardous conditions;
- Use of appropriate personal protective equipment;
- Medical surveillance program;
- Youth and inexperience of employees, especially those under 18 years old; and
- Other pertinent working conditions.

EXAMPLE 6-1: Greater probability may include an employee exposed to the identified hazard for four hours a day, five days a week. Lesser probability may be present when an employee is performing a non-routine task with two previous exposures within the previous year and no injuries or illnesses are associated with the identified hazard.

c. **Final Probability Assessment.**

All of the factors outlined above shall be considered in determining a final probability assessment.

When adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the assessment may be adjusted at the discretion of the Branch Manager or Administrator as appropriate. Such decisions shall be documented in the case file.

3. **Gravity-Based Penalty (GBP).**

- a. The gravity-based penalty (GBP) for each violation shall be determined by combining the severity assessment and the final probability assessment. Penalties proposed for serious violations related to hazards that have caused death multiple times in the

State of Hawaii (falls, heavy equipment, forklifts, high voltage electrical, etc.) shall be classified as high greater.

- b. GBP is an unreduced penalty and is calculated in accordance with the procedures below.

NOTE: Throughout the FOM when the term “unreduced penalty” is used, it is the same as GBP.

4. **Serious Violation and GBP.**

- a. The gravity of a violation is defined by the GBP:
- A high gravity violation is one with a GBP of \$5,500 or greater.
 - A moderate gravity violation is one with a GBP of between \$2,500 and \$4,000.
 - A low gravity violation is one with a GBP of \$1,500.
- b. The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violative conditions, such as those situations involving danger of death or extremely serious injury or illness. In inspections of fatalities and/or accidents involving permanent disability, all serious violations related to the accident shall be assessed a penalty of \$7,700.
- c. If the Administrator determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,700 may be proposed instead of \$5,500. Such discretion should be exercised based on the facts of the case. The reasons for this determination shall be documented in the case file.
- d. For serious violations, the GBP shall be assigned on the basis of the following scale in Table 6-2: Severity + Probability = GBP .

Table 6-2: Serious Violations

| Severity | Probability | GBP | Gravity | IMIS Code |
|----------|-------------|-------------------------|----------|-----------|
| High | Greater | \$5,500 (or \$7,700) | High | 10 |
| Medium | Greater | \$4,000 | Moderate | 5 |
| High | Lesser | \$3,500 | Moderate | 4 |
| Low | Greater | \$3,000 | Moderate | 3 |
| Medium | Lesser | \$2,500 | Moderate | 2 |
| Low | Lesser | \$1,500 | Low | 1 |

5. **Other-Than-Serious Violations and GBP.**

- a. For other-than-serious safety and health violations, there is only minimal severity.
- b. If the Administrator determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,700 may be proposed. The reasons for this determination shall be documented in the case file.

Table 6-3: Other-Than-Serious Violations

| Severity | Probability | GBP |
|----------|-------------|-------------------|
| Minimal | Greater | \$1,500 - \$7,700 |
| Minimal | Lesser | \$0 |

6. **Exception to GBP Calculations.**

For some cases, a GBP may be assigned without using the severity and the probability assessment procedures outlined in this section when these procedures cannot appropriately be used. In such cases, the assessment assigned and the reasons for doing so shall be explained in the case file.

7. **Egregious Cases.**

In egregious cases, violation-by-violation penalties are applied. Such cases shall be handled in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990 and adopted by HIOSH on October 5, 1994, revised on March 1, 1996. Penalties calculated under this policy shall not be proposed without the concurrence of the Administrator and the Deputy Attorney General (DAG).

8. **Gravity Calculations for Combined or Grouped Violations.**

Combined or grouped violations will be considered as one violation with one GBP. The following procedures apply to the calculation of penalties for combined and grouped violations:

NOTE: Multiple violations of a single standard may be combined into one citation item. When a hazard is identified which involves interrelated violations of different standards, the violations may be grouped into a single item.

a. **Combined Violations.**

The severity and probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation once the instance with the highest gravity is identified.

b. **Grouped Violations.**

The following shall be adhered to:

- **Grouped Severity Assessment**

There are two considerations for calculating the severity of grouped violations:

- The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item; AND
- If the injury or illness that is reasonably predictable from the grouped items is more serious than that from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor.

- **Grouped Probability Assessment**

There are two factors for calculating the probability of grouped violations:

- The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness; AND
- If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment.

B. Penalty Reduction Factors.

1. **General.**

- a. Penalty reductions can combine to a maximum of up to 95% of the GBP, depending upon the employer's "size" (number of employees), "good faith," and "history of previous violations."
 - A maximum of 60 percent reduction is permitted for size;
 - A maximum of 25 percent reduction for good faith; and
 - 10 percent reduction may be given for history.
- b. Since these reduction factors are based on the general character of an employer's safety and health performance, they normally shall be calculated only once for each employer.
- c. After the classification (as serious or other-than-serious) and the GBP have been determined for each violation, the penalty reduction factors (for size, good faith, history) shall be applied subject to the following limitations:

- Penalties proposed for violations classified as repeated shall be reduced only for size.
- Penalties proposed for violations classified as willful, shall be reduced only for size and history.
- Penalties proposed for serious violations classified as high severity/greater probability shall be reduced only for size and history.

2. **Size Reduction.**

- a. A maximum penalty reduction of 60 percent is permitted for small employers. "Size of employer" shall be calculated on the basis of the maximum number of employees of an employer at all workplaces nationwide, including State Plan States, at any one time during the previous 12 months. Government agencies will use the size of the entire entity. The number of employees controlled by the State or a county government will be total number of employees in a department.

- b. The rates of reduction to be applied are as follows:

| <u>Employees</u> | <u>Percent reduction</u> |
|------------------|--------------------------|
| 1-25 | 60 |
| 26-100 | 40 |
| 101-250 | 20 |
| 251 or more | None |

- c. When an employer with 250 or less employees has one or more serious violations of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the inspector may recommend that only a partial reduction in penalty shall be permitted for size. If the Administrator approves the partial reduction, the reason should be documented in the case file.

3. **Good Faith Reduction.**

A penalty reduction is permitted in recognition of an employer's effort to implement and maintain an effective safety and health management system in the workplace. The following apply to reductions for good faith:

a. **Reduction Not Permitted.**

- No reduction shall be given for **high gravity serious violations**.
- No reduction shall be given if a **willful violation** is found. Additionally, where a willful violation has been documented,

no reduction for good faith can be applied to **any** of the violations found during the same inspection.

- No reduction shall be given for **repeated violations**. If a repeated violation is found, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given if a **failure to abate violation** is found during an inspection. No good faith reduction shall be given for any violation in the inspection in which the FTA was found.
- No reduction shall be given to employers being cited under abatement verification for any §1903.19 violations.
- No reduction shall be given if the employer has **no safety and health management system**, or if there are **major deficiencies** in the program.

b. **Twenty Five Percent Reduction.**

A 25 percent reduction for “good faith” normally requires a written safety and health management system. In exceptional cases, the inspector may recommend a full 25 percent reduction for employers with 1-25 employees who have implemented an effective safety and health management system, but has not reduced it to writing.

To qualify for this reduction, the employer’s safety and health management system must meet the requirements of the safety and health program standard (§12-60-2(b) or §12-110-2(b)) and provide for:

- Appropriate management commitment and employee involvement, including mechanisms to hold supervisors accountable for safety and health responsibilities;
- Worksite analysis for the purpose of hazard identification, including monitoring for health hazards and investigation of near-miss incidents;
- Hazard prevention and control measures, which includes an equipment maintenance program and recordkeeping;
- Safety and health training;
- Periodic program evaluation and improvement; and
- Where young persons (i.e., less than 18 years old) are employed, the inspector’s evaluation must consider whether the employer’s safety and health management system appropriately addresses the particular needs of such

employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

- Where persons who speak limited or no English are employed, the inspector's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

c. **Fifteen Percent Reduction.**

A 15 percent reduction for good faith shall normally be given if the employer has a documented and effective safety and health management system, with only incidental deficiencies.

EXAMPLE 6-2: An acceptable program should include minutes of employee safety and health meetings, documented employee safety and health training sessions, or any other evidence of measures advancing safety and health in the workplace.

d. **Allowable Percentages.**

Only these percentages (15% or 25%) may be used to reduce penalties due to the employer's good faith.

4. **History Reduction.**

a. **Allowable Percent.**

A reduction of 10 percent shall be given to employers who have not been cited by OSHA nationwide, or by any State Plan State for any serious, willful, or repeated violations in the prior three years.

b. **Time Limitation and Final Order.**

The three-year history of no prior citations (both Federal and State) shall be calculated from the opening conference date of the current inspection. Only citations that have become a final order within the three years immediately before the opening conference date shall be considered.

c. **Reduction Will Not be Given.**

- For a repeated violation, or
- To employers being cited under abatement verification for any §1903.19 violations, or
- For **serious** violations related to hazards that have caused death multiple times in the State of Hawaii (falls, heavy equipment, forklifts, high voltage electrical).

5. **Total Reduction.**

The total reduction will normally be the sum of the reductions for each factor. Table 6-4 provides an overview of the percent of penalty reductions applicable to serious, other-than-serious, and repeated violations.

6. **Penalty Table.**

Table 6-4 may be used for determining appropriate reduced penalties for serious and other-than-serious violations.

Table 6-4: Penalty Table

| Percent Reduction | Penalty in Dollars | | | | | | |
|-------------------|--------------------|---------|---------|---------|---------|----------|----------|
| 0 | \$1,500 | \$2,500 | \$3,000 | \$3,500 | \$4,000 | \$5,500 | \$7,700 |
| 10 | \$1,350 | \$2,250 | \$2,700 | \$3,150 | \$3,600 | \$4,950 | \$6,930 |
| 15 | \$1,275 | \$2,125 | \$2,550 | \$2,975 | \$3,400 | \$4,675* | \$6,545* |
| 20 | \$1,200 | \$2,000 | \$2,400 | \$2,800 | \$3,200 | \$4,400 | \$6,160 |
| 25 | \$1,125 | \$1,875 | \$2,250 | \$2,625 | \$3,000 | \$4,125* | \$5,775* |
| 30 | \$1,050 | \$1,750 | \$2,100 | \$2,450 | \$2,800 | \$3,800 | \$5,390 |
| 35 | \$975 | \$1,625 | \$1,950 | \$2,275 | \$2,600 | \$3,575* | \$5,005* |
| 40 | \$900 | \$1,500 | \$1,800 | \$2,100 | \$2,400 | \$3,300 | \$4,620 |
| 45 | \$825 | \$1,375 | \$1,650 | \$1,925 | \$2,200 | \$3,025 | \$4,235* |
| 50 | \$750 | \$1,250 | \$1,500 | \$1,750 | \$2,000 | \$2,750 | \$3,850 |
| 55 | \$675 | \$1,125 | \$1,350 | \$1,575 | \$1,800 | \$2,475* | \$3,465* |
| 60 | \$600 | \$1,000 | \$1,200 | \$1,400 | \$1,600 | \$2,200 | \$3,080 |
| 65 | \$525 | \$875 | \$1,050 | \$1,225 | \$1,400 | \$1,925* | \$2,695* |
| 70 | \$450 | \$750 | \$900 | \$1,050 | \$1,200 | \$1,650 | \$2,310 |
| 75 | \$375 | \$625 | \$750 | \$875 | \$1,000 | \$1,375* | \$1,925* |
| 85 | \$225 | \$375 | \$450 | \$525 | \$600 | \$825* | \$1,155* |
| 95 | \$100 | \$125 | \$150 | \$175 | \$200 | \$275* | \$385* |

* Starred figures represent penalty amounts that would not normally be proposed for high gravity serious violations because no reduction for good faith is made in such cases. They may occasionally be applicable for other-than-serious violations where the Branch Manager or Administrator has determined a high unreduced penalty amount to be warranted.

IV. Repeated Violations.

A. General.

1. Each repeated violation shall be evaluated as serious or other-than-serious, based on current workplace conditions, and not on hazards found in the prior case.
2. A GBP shall then be calculated for repeated violations based on facts noted during the current inspection.
3. Only the reduction factor for size, appropriate to the facts at the time of the re-inspection, shall be applied.

NOTE: Section 10(f) of the Law provides that an employer who repeatedly violates the Law may be assessed a civil penalty of not more than \$77,000 for each violation.

B. Penalty Increase Factors.

The amount of any increase to a proposed penalty for repeated violations shall be determined by the size of the employer's business.

1. Small Employers.

For employers with 250 or fewer employees nationwide, the GBP shall be multiplied by **2** for the first repeated violation and multiplied by **5** for the second repeated violation. The GBP may be multiplied by **10** in cases where the Branch Manager or the Administrator determines that it is necessary to achieve the deterrent effect. The reasons for imposing a high multiplier factor shall be explained in the file.

2. Large Employers.

For employers with more than 250 employees nationwide, the GBP shall be multiplied by **5** for the first repeated violation and, by **10** for the second repeated violation.

C. Other-than-Serious, No Initial Penalty.

For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of \$200 shall be proposed for the first repeated violation, \$500 for the second repeated violation, and \$1,000 for a third repetition.

NOTE: These penalties shall not be subject to the Penalty Increase factors as discussed in Paragraph B. above.

D. Regulatory Violations.

1. For calculating the GBP for regulatory violations, see Paragraph III.A.5. and Section IX.
2. For repeated instances of regulatory violations, the initial penalty (of current inspection) shall be multiplied by **2** for the first repeated violation and multiplied by **5** for the second repeated violation. If the Branch

Manager or Administrator determines that it is necessary to achieve the proper deterrent effect, the initial penalty may be multiplied by **10**.

V. Willful Violations.

Section 10(f) of the Law provides that an employer who willfully violates the Law may be assessed a civil penalty of not more than \$77,000 for each violation, but not less than \$5,500 for each violation. See *Minimum Penalties* at Paragraph II.C. of this chapter.

A. General.

1. Each willful violation shall be classified as serious or other-than-serious.
2. There shall be no reduction for good faith.
3. In no case shall the proposed penalty for a willful violation (serious or other-than-serious) after reductions be less than \$5,500.

B. Serious Willful Penalty Reductions.

The reduction factors for size and history for serious willful violations shall be applied as shown in the following chart.

Table 6-7: Penalties to be Proposed for Serious Willful Violations

| Total percent reduction for size and/or history | High Gravity | Moderate Gravity | Low Gravity |
|--|---------------------|-----------------------------|--------------------|
| 0% | \$77,000 | \$60,000 | \$45,000 |
| 10% | \$69,300 | \$54,000 | \$40,500 |
| 20% | \$61,600 | \$48,000 | \$36,000 |
| 30% | \$53,900 | \$42,000 | \$31,500 |
| 40% | \$46,200 | \$36,000 | \$27,000 |
| 50% | \$38,500 | \$30,000 | \$22,500 |
| 60% | \$30,800 | \$24,000 | \$18,000 |
| 70% | \$23,100 | \$18,000 | \$13,500 |

C. Willful Regulatory Violations.

1. For calculating the GBP for regulatory violations, see Paragraph III.A.5. and Section IX for other-than-serious violations.
2. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than \$5,500.

VI. Penalties for Failure to Abate.

A. General.

1. Failure to Abate penalties shall be proposed when:

- a. A previous citation issued to an employer has become a final order; and
 - b. The condition, hazard or practice found upon re-inspection is the same for which the employer was originally cited and has never been corrected by the employer (i.e., the violation was continuous).
2. The citation has to have become a final order when the abatement date for that item passes, if the employer has not filed a notice of contest prior to that abatement date.
3. See Chapter 15, *Legal Issues*, for information on determining final dates of uncontested citations, settlements and Hawaii Labor Relations Board decisions.

B. Calculation of Additional Penalties.

1. Unabated Violations.

A GBP for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection. This recalculated GBP, however, shall not be less than that proposed for the item when originally cited.

- a. EXCEPTION: When the inspector believes and documents in the case file that the employer has made a good faith effort to correct the violation and had an objective reasonable belief that it was fully abated, the Branch Manager may reduce or eliminate the daily proposed penalty.
- b. For egregious cases, see CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.

2. No Initial Proposed Penalty.

In instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Branch Manager. In no case shall the GBP be less than \$500 per day for an other-than-serious violation and less than \$1,000 per day for a serious violation.

3. Size Only Permissible Reduction Factor.

Only the reduction factor for size – based upon the circumstances noted during the re-inspection – shall be applied to arrive at the daily proposed penalty.

4. Daily Penalty Multiplier.

The daily proposed penalty shall be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:

- a. The number of days unabated shall be counted from the day following the abatement date specified in the citation or the final order. It will include all calendar days between that date and the date of re-inspection, excluding the date of re-inspection.
- b. Normally the maximum total proposed penalty for failure to abate a particular violation shall not exceed **30** times the amount of the daily proposed penalty.
- c. At the discretion of the Branch Manager, a lesser penalty may be proposed. The reasoning for the lesser penalty shall be documented (e.g., achievement of an appropriate deterrent effect) in the case file.
- d. If a penalty in excess of the normal maximum amount of **30** times the amount of the daily proposed penalty is deemed necessary by the Branch Manager to deter continued non-abatement, the case shall be treated pursuant to the violation-by-violation (egregious) penalty procedures established in CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.

C. Partial Abatement.

1. When a citation has been partially abated, the Branch Manager may authorize a reduction of 25 to 75 percent to the amount of the proposed penalty calculated as outlined above.
2. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent of the abatement efforts.

EXAMPLE 6-3: Where three out of five instances have been corrected, the daily proposed penalty (calculated as outlined above, without regard to any partial abatement) may be reduced by 60 percent.

VII. Violation-by-Violation (Egregious) Penalty Policy.

A. Penalty Procedure.

Each instance of noncompliance shall be considered a separate violation with individual proposed penalties for each violation. This procedure is known as the egregious or violation-by-violation penalty procedure.

B. Case Handling.

Such cases shall be handled in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.

C. Calculation of Penalties.

Penalties calculated using the violation-by-violation policy shall not be proposed without the concurrence of the Administrator.

VIII. Significant Enforcement Actions.

A. Definition.

A significant enforcement action (aka significant case) is one which results from an investigation in which the total proposed penalty is \$100,000 or more.

B. Multi-employer Worksites.

Several related inspections involving the same employer, or involving more than one employer in the same location (such as multi-employer worksites) and submitted together, may also be considered to be a significant enforcement action if the total aggregate penalty is \$100,000 or more.

C. Administrator Concurrence.

The Administrator's concurrence is normally required for issuing citations in significant enforcement cases.

IX. Penalty and Citation Policy for Part 1903 and 1904 Regulatory Requirements.

Section 10(e) of the Law provides that any employer who violates any of the posting requirements shall be assessed a civil penalty of up to \$7,700 for each violation (this includes recordkeeping violations). The following policy and procedure document must also be consulted for an in-depth review of these policies: CPL 02-00-111, *Citation Policy for Paperwork and Written Program Requirement Violations*, issued November 27, 1995, adopted by HIOSH on January 19, 1996. GBPs for regulatory violations, including posting requirements, shall be reduced for size and history (excluding willful violations, see Chapter 4, Section V, *Willful Violations*).

A. Posting Requirements Under Chapter 51, HAR.

A penalty of up to \$5,500 may be proposed for violations of the following posting requirements:

1. Failure to Post the OSHA Notice (Poster) – §12-51-2.

A citation for failure to post the HIOSH/OSHA Notice is warranted if:

- a. The pattern of violative conditions for a particular establishment demonstrates a consistent disregard for the employer's responsibilities under the Hawaii Occupational Safety and Health Law; AND
- b. Interviews show that employees are unaware of their rights under the Act; OR

- c. The employer has been previously cited or advised by HIOSH/OSHA of the posting requirement.

If the criteria above are met and the employer has not displayed (posted) the notice furnished by HIOSH as prescribed in §12-51-2(a), an other-than-serious citation shall normally be issued. A minimum penalty of \$250 may be assessed.

2. Failure to Post a Citation - §12-51-16.

- a. If an employer received a citation that was not posted as prescribed in §12-51-16, an other-than-serious citation shall normally be issued. A minimum penalty of \$500 may be assessed.
- b. For information regarding the OSHA-300A form, see CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*, December 30, 2004.

B. Advance Notice of Inspection – §12-51-6

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by §12-51-6(b), HAR, an other-than-serious citation may be issued with an unadjusted penalty of up to \$1,000.

C. Abatement Verification Regulation Violations – §12-51-22

1. General.

- a. The penalty provisions of Section 10 of the HIOSH Law apply to all citations issued *under* this regulation.
- b. No “Good Faith” or “History” reduction shall be given to employers when *proposing* penalties for any §12-51-22 violations. Only the reduction factor for “Size” shall apply.
- c. See *Chapter 7, Post-Citation Inspection Procedures and Abatement Verification*, for detailed guidance.

2. Penalty for Failing to Certify Abatement.

- a. A penalty for failing to *submit* abatement certification documents, §1903.19(c)(1), shall be \$1,000, reduced only for size.
- b. A penalty for *failure* to submit abatement verification documents will not exceed the penalty for the entire original citation.

3. Penalty for Failing to Notify and Tagging.

Penalties for not notifying employees and tagging movable equipment §12-51-22 [paragraphs (h)(1), (h)(2), (h)(4), (j)(1), (j)(3), (j)(4), (j)(6) and (j)(7)] will follow the same penalty structure (GBP of \$3,000) as for Failure to Post a Citation.

D. Injury and Illness Records and Reporting under Part 1904.

- 1. Part 1904 violations are always other-than-serious.

2. Repeated and Willful penalty policies in Paragraphs IV.D. and V.C., respectively, of this Chapter, may be applied to recordkeeping violations.
3. OSHA's egregious penalty policy may be applied to recordkeeping violations. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.
4. See CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*, dated December 30, 2004; specifically Chapter 2, Section II, *Inspection and Citation Procedures*.

X. Failure to Provide Access to Medical and Exposure Records – §1910.1020.

A. Proposed Penalties.

If an employer is cited for failing to provide access to records as required under §1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, a GBP of \$1,000 shall normally be proposed for each record (i.e., either medical record or exposure record, on an individual employee basis). A maximum GBP of \$7,700 may be proposed for such violations. See CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, dated August 22, 2007, adopted by HIOSH on December 19, 2007.

EXAMPLE 6-4: If the evidence demonstrates that an authorized employee representative requests both exposure and medical records for three employees and the request was denied by the employer, a citation would be issued for six instances (i.e., one medical record and one exposure record (total two) for each of three employees) of a violation of §1910.1020, with a GBP of \$6,000.

B. Use of Violation-by-Violation Penalties.

The above policy does not preclude the use of violation-by-violation or per employee penalties where higher penalties are appropriate. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.

XI. Criminal Penalties.

A. HIOSH Law and Hawaii Penal Code.

The Law provides for criminal penalties in the following cases:

1. Willful violation of a HIOSH standard, rule, or order causing the death of an employee; Section 10(g);
2. Giving unauthorized advance notice; Section 10(i);
3. Knowingly giving false information; Section 10(m); and

4. Committing criminal offenses against any employee of the State while engaged in the performance of investigative, inspection or law enforcement functions; Section 10(n).

B. Courts

Criminal penalties are imposed by the courts after trials and not HIOSH or the Hawaii Labor Relations Board.

XII. Handling Monies Received from Employers

A. Responsibility of the Branch Manager

Pursuant to its statutory authority, it is HIOSH policy to collect all penalties owed to the government. The Branch Manager is responsible for:

1. Informing employers of HIOSH's debt collection procedures;
2. Collecting assessed penalties from employers;
3. Offering a reasonable installment payment plan, where appropriate;
4. Referring cases with uncollected penalties to the DAG; and
5. Noting and retaining bankruptcy documents for possible action by the DAG.

B. Receiving Payments.

The Branch Manager shall be guided by the following with regard to penalty payments:

1. Methods of Payment.

Employers assessed penalties shall remit the total payment to the HIOSH office by certified check, personal check, company check, postal money order, bank draft or bank money order, payable to the **Director of Budget and Finance**. Payment in cash shall not be accepted. Upon request of the employer and for good cause, alternate methods of payment are permissible, such as payments in installments.

2. Transmitting Payment to ATS.

The Branch is responsible for locating the case file and determining if the penalty is paid in full or a partial payment was made. If payment was made in full, the check or other payment instrument must be attached to the case file and forwarded to ATS.

If payment was only partial, and the employer had not contested the citation item or penalty and there was no request for installment payment, the Branch shall notify the employer that the full amount is due and payable within 20 calendar days. If the employer indicates that a notice of contest will be filed for the remaining items, it shall be reminded of the 20 calendar day requirement for timely contest notices and a notation shall be made in the Case Diary log. The transmittal to

ATS will indicate for which citation items, the check or other payment instrument was for.

3. **ATS Responsibility.**

ATS responsibilities include:

- a. Entering the payment information correctly and timely into the database;
- b. Ensuring that the payment instrument is valid; and
- c. Transmitting checks or other payment instruments to ASO/Fiscal on a daily basis.

The following adjustments shall be made prior to transmitting the payment instrument to the ASO/Fiscal.

- 1) If the payment instrument is not dated, the date received shall be entered as the date of payment.
- 2) If the payment instrument has differing numeric and written amounts, the written amount shall be credited and the instrument transmitted. If the written amount is obviously incorrect or differs from the amount referenced in the accompanying correspondence, the payment instrument shall be returned to the employer via certified mail for correction.
- 3) If the payment instrument is unsigned, the payment shall be transmitted.
- 4) If an employer mistakenly makes the payment payable to an official of HIOSH by name or to other than "Director of Budget and Finance", it shall be transmitted.

4. **Incorrect, Unhonored, or Foreign Payments.**

- a. Incorrectly dated payments shall be handled as follows:
 - If the payment instrument is dated 10 days or more after the date of receipt, it is to be returned to the employer.
 - If the payment instrument is dated less than 10 but more than 3 days after the date of receipt, it is to be held for deposit on the day it is dated.
 - Payment instruments dated 3 or fewer days after the date of receipt are to be transmitted.
 - If the payment instrument is dated more than six months prior to the current date, it is to be returned to the employer via certified mail.
- b. Payment instruments which have been returned to ASO/Fiscal without payment, due to insufficient funds, shall be forwarded to the HIOSH office for collection efforts.

- c. Payments drawn on non-U.S. banks are to be transmitted.
A copy of the penalty payment instrument shall be included in the case file. Additional accounting records shall also be included in the case file in accordance with current procedures.

C. Refunds.

In cases of later penalty modifications by HIOSH or by the Board or a court, refunds to the employer shall be made by HIOSH through ASO/Fiscal. The Branch Manager shall prepare a memo detailing the reasons for the refund and attach copies of decisions and orders, or amendments to the Citation and Notification of Penalty in accordance with current instructions.

XIII. Debt Collection Procedures.

A. Policy.

At this time, HIOSH does not assess any interest on past due penalties. As such, installment payments are to be offered any employer who indicates that they would not be able to pay the full amount within the 20 calendar days.

Hawaii Rules of Civil Procedure allow the division to collect fees only such as sheriff's fees and court filing fees. Attorney's fees cannot be assessed at this time.

B. Time Allowed for Payment of Penalties.

The date when penalties become due and payable depends on whether or not the employer contests.

1. Uncontested Penalties.

When citations and/or proposed penalties are uncontested, the penalties are due and payable 20 calendar days following the employer's receipt of the Citation and Notification of Penalty or, in the case of Informal Settlement Agreements, 20 calendar days after the date of the last signature unless a later due date for payment of penalties is agreed upon in the settlement.

2. Contested Penalties.

When citations and/or proposed penalties are contested, the date penalties are due and payable will depend upon whether the case is resolved by a settlement agreement, a Board decision, or a court judgment. See Chapter 15, Section XIII, *Citation Final Order Dates*, for additional information.

NOTE: The Branch Manager shall forward the notice of contest and the case file to the DAG via a transmittal memo.

3. Partially Contested Penalties.

When only part of a citation and/or a proposed penalty is contested, the due date for payment as stated in Paragraph 1. above, *Uncontested*

Penalties, shall be used for the uncontested items and the due date stated in Paragraph 2. above, *Contested Penalties*, for the contested items.

NOTE: This provision notwithstanding, formal debt collection procedures will not be initiated in partially contested cases until a final order for the outstanding citation items has been issued.

C. Notification Procedures.

Once the penalty payment has become past due and payable (See B. above), it is HIOSH policy to notify employers that debts are payable and due, and to inform them of HIOSH's debt collection procedures whereby additional collection fees may be assessed. (See A. above on fees that may be collected.) A phone call should be made to the employer to state that the penalty is due. If there is no response, the payment past due letter will be sent via certified mail with return receipt and signed by the Branch Manager and is to include a contact telephone number. This past due letter is to be retained in the case file.

D. Installment Payment Plans.

Installment payment plans may be offered where the Branch Manager or Administrator believes that the HIOSH policy of appropriate deterrence for non-compliance with safety and health obligations can still be met.

1. The Installment Agreement Plan must be in writing and signed by the employer.

The document must contain the following:

- The total amount that is due and payable;
- The agreed upon monthly payment. The minimum payment shall be \$200 per month;
- The date the first payment is due, and the date of the month each subsequent payment is due;
- The amount of the last payment due;
- The consequences for untimely payments, i.e., the entire remaining amount of the original unadjusted penalty becomes due and payable within 20 calendar days of notification that the installment payment was past due; and
- Signature and date signed by the employer.

2. Execution of the Installment Agreement Plan.

The Plan must be signed, dated and returned by the employer within 20 calendar days of agreeing to the terms. Penalty payment plans may be renegotiated at the employer's or HIOSH's discretion. Any changes made to the original payment plan must be approved by HIOSH for the amended plan to be valid.

3. **Government Agencies.**

State and county agencies may sometimes have to secure legislative funding to pay the assessed penalty. Therefore, for State and county agencies, it may be necessary to craft a payment plan that defers the payment to the next fiscal year following legislative or county council approval.

E. Referral to DAG for Collection.

1. If any portion of the payment remains unpaid, the Branch Manager shall call the employer, remind it of the outstanding balance, and document the contact in the case file. If payment is not received within 5 working days from the call, a reminder letter shall be mailed or faxed to the employer. If payment is not received within 20 calendar days from the time the past due notice was sent to the employer, the Branch Manager shall refer the case to the DAG for collection.
2. A memo to the Supervising DAG for Labor shall be sent with the following information and/or copies of documents:
 - a. Citation and Notification of Penalty.
 - b. Copy of Certified/Return Receipt from Employer.
 - c. Case File Diary notations referring to telephone calls and correspondence regarding collection.
 - d. Contest letter showing what is being contested. If case is not being contested or contest is resolved, state "not in contest" in memo.
 - e. Contest transmittal letter, summarizing contested items.
 - f. Informal Settlement agreement.
 - g. Past due notice.
 - h. Installment Payment Agreement.
 - i. Installment payment log showing dates and amounts of any partial payments.
 - j. Information from DCCA regarding company officers.
3. After a case has been referred to the DAG for collection, the Branch Manager has no further responsibilities with regard to penalty collection related to that case.
4. If, after a case has been referred to the DAG, the employer mistakenly sends a payment to the office, or new information regarding the debt or employer is obtained, the Branch Manager shall contact the DAG immediately.
5. The responsibility for closing the case remains with the Branch Manager. Once final collection action has been completed, the case may be closed as long as all violative items have been appropriately abated. HIOSH does not have the authority to write off debts over \$500. Permission must be received from the DAG by submitting a memo requesting the write-off with Attachment LS/XVIII-A.

F. Uncollectible Penalties.

There may be cases where a penalty cannot be collected, regardless of any action that has been or may be undertaken. Examples might be when a past due letter is not deliverable, a company is no longer in business and has no successor, or the employer is bankrupt. In such cases, the Branch Manager shall notify the DAG by phone or email prior to referring the case to the DAG. The DAG will then advise what further collection action is appropriate. The database shall be updated following current procedures to reflect the most recent action. In bankruptcy cases, the Branch Manager may also seek the advice of the DAG to determine whether to file as a creditor under Hawaii Bankruptcy Law.

APPENDIX 6A: DELINQUENT ACCOUNT(S) WRITE-OFF CHECKLIST

Attachment LS/XVIII-A (for accounts over \$500.00)

Department of Labor & Industrial Relations, Hawaii Occupational Safety and Health Division

Branch: ☐ Occupational Safety ☐ Occupational Health

Contact Person: Click here to enter text. **Title:** Click here to enter text.

Telephone: Click here to enter text. **E-mail:** Click here to enter text.

Debtor: Click here to enter text.

Inspection No.(s) Click here to enter text.

Type of Debt Non-payment of Assessed Penalties

Amount Click here to enter text.

| | | YES | NO | UNK |
|----|--|--------------------------|--------------------------|-------|
| 1. | Is/Are account(s) delinquent for at least 2 years? | <input type="checkbox"/> | <input type="checkbox"/> | ----- |

| | | | | |
|-----|---|--------------------------|--------------------------|--------------------------|
| 2. | Is debtor known? | <input type="checkbox"/> | <input type="checkbox"/> | ---- |
| 3. | Is debtor within the State? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. | Can debtor be located? | <input type="checkbox"/> | <input type="checkbox"/> | ---- |
| 5. | Has debtor filed bankruptcy? | <input type="checkbox"/> | <input type="checkbox"/> | |
| | a. If yes, has Proof of Claim been filed? | <input type="checkbox"/> | <input type="checkbox"/> | ---- |
| | b. Status: Click here to enter text. | | | |
| 6. | Is debtor deceased? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | a. Has claim been timely filed with the estate? | <input type="checkbox"/> | <input type="checkbox"/> | ---- |
| | b. Status: Click here to enter text. | | | |
| 7. | Is this account deemed by you to be uneconomical or impractical to collect? | <input type="checkbox"/> | <input type="checkbox"/> | ---- |
| | If yes, why? Because the cost of pursuing the case would be in excess of \$1,500 with attorney's costs, sheriff's fees, and staff time. | | | |
| 8. | Has debtor been placed on tax intercept pursuant to §231-53, HRS ¹ ? | <input type="checkbox"/> | <input type="checkbox"/> | ---- |
| | a. If yes, result: Click here to enter text. | | | |
| | b. If no, why not? Click here to enter text. | | | |
| 9. | Is debtor a State employee? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. | Is debtor a former State employee? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 11. | Is debtor a retired State or county employee? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 12. | If debtor is a State employee, has debtor been placed on §78-12, HRS, salary withholding? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | a. If yes, result: Click here to enter text. | | | |
| | b. If no, why not? Click here to enter text. | | | |
| 13. | Is debtor a corporation? | <input type="checkbox"/> | <input type="checkbox"/> | ---- |
| | a. If yes, list the officers, their office, their addresses and telephone numbers: | | | |

¹ **[§231-53] Setoff against refund.** The State, through the Department of Accounting and General Services, upon request of a claimant agency, shall set off any valid debt due and owing a claimant agency by the debtor against any debtor's refund. Any amount of the refund in excess of the amount retained to satisfy the debt shall be refunded to the debtor. [L 1982, c 199, pt of §1]

| <u>Name</u> | | <u>Office(s) Held</u> | <u>Address(es)</u> | <u>Phone No.(s)</u> | | |
|---------------------------|---|---------------------------|---------------------------|---------------------------|--------------------------|--------------------------|
| Click here to enter text. | | Click here to enter text. | Click here to enter text. | Click here to enter text. | | |
| Click here to enter text. | | Click here to enter text. | Click here to enter text. | Click here to enter text. | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | YES | NO | UNK |
| 14. | If debtor is a corporation, is the corporation dissolved or being liquidated? | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | a. When was the corporation dissolved or liquidated? Click here to enter text. | | | | | |
| | b. What remedies under §414-386 or §414-387, HRS have been pursued? If none, why not? Click here to enter text. | | | | | |
| | Click here to enter text. | | | | | |
| 15. | Is debtor a partnership (Chap 425, HRS) | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | a. If yes, list the partners, their addresses and telephone numbers: | | | | | |
| <u>Name</u> | | <u>General or Limited</u> | <u>Address(es)</u> | <u>Phone No.(s)</u> | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | YES | NO | UNK |
| 16. | Is partnership dissolved? | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | a. If yes, when? | | | | | |
| | b. Under §425-136, HRS _____ does not _____ discharge the debt. | | | | | |
| | What efforts have been made to collect? | | | | | |
| | | | | YES | NO | UNK |

| | | | | | | |
|-----|---|---|---------------------------|---------------------------|---------------------------|--------------------------|
| 17. | Are there others who may be liable for the debt (<i>herein collectively "debtor", ex. Piercing the corporate veil; guarantor(s); parents; guardians, etc.</i>)? | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | a. | If yes, list names, their address and telephone: | | | | |
| | | <u>Name(s)</u> | <u>Relationship</u> | <u>Address(es)</u> | <u>Phone No.(s)</u> | |
| | | Click here to enter text. | Click here to enter text. | Click here to enter text. | Click here to enter text. | |
| | | Click here to enter text. | Click here to enter text. | Click here to enter text. | Click here to enter text. | |
| | | Click here to enter text. | Click here to enter text. | Click here to enter text. | Click here to enter text. | |
| | | | | YES | NO | UNK |
| 18. | Have you attempted to contact debtor by telephone and mail? | | | <input type="checkbox"/> | <input type="checkbox"/> | ----- |
| | a. | If yes, who and the response or statements? Click here to enter text. | | | | |
| | b. | If no, why not? Click here to enter text. | | | | |
| 19. | Have you attempted to negotiate settlement or payment plan | | | <input type="checkbox"/> | <input type="checkbox"/> | ----- |
| | a. | If yes, results: Click here to enter text. | | | | |
| | b. | If no, why not? Click here to enter text. | | | | |
| 20. | Have you referred the account(s) to a collection agency? | | | <input type="checkbox"/> | <input type="checkbox"/> | ----- |
| | a. | If yes, results: Click here to enter text. | | | | |
| | b. | If not, why not? Click here to enter text. | | | | |
| 21. | What other efforts have been made to collect? Click here to enter text. | | | | | |
| | | | | YES | NO | UNK |
| 22. | Is debtor receiving other State benefits? | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | | If yes, what? Click here to enter text. | | | | |
| 23. | Is debtor sitting on any State or county boards or commissions? | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | | If yes, what? Click here to enter text. | | | | |
| 24. | Does debtor have any miscellaneous cases pending? | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| | | If yes, please provide explanation: Click here to enter text. | | | | |

| | |
|-----|---|
| 25. | How can your department improve its collection efforts? Click here to enter text. |
| | Click here to enter text. |
| 26. | Additional comments, if any: Click here to enter text. |